No. 09-1418

IN THE

Supreme Court of the United States

TALISMAN ENERGY, INC.,
Petitioner,
vs.
THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

All parties or respondents are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the respondents is a nongovernmental corporation. None of the respondents has a parent corporation or shares held by a publicly traded company.

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STATEMENT OF THE CASE

Talisman Energy, Inc. ("Talisman") makes no serious attempt to oppose Plaintiffs' Petition for a Writ of Certiorari ("Petition" or "Cert. Pet."). The issues raised in Plaintiffs' Petition concerning aiding and abetting and conspiracy liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, are the central issues dividing lower courts in ATS cases.

Talisman's Conditional Cross-Petition for a Writ of Certiorari ("Cross-Petition") asks this Court to review whether the ATS applies to corporations or to human rights violations occurring outside the territory of the United States. There is no basis for review of these issues in this Court because there is no split of authority on these issues. Indeed, not a single case decided under the ATS before or after this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), supports Talisman's position on either issue.

No court has found that corporations are exempt from tort liability or that they are not proper defendants under the ATS. The Court of Appeals explicitly declined to address this issue in this case. (Cert. Pet. App. 36 n. 12). To the contrary, there have been dozens of ATS claims against corporations and not a single one has been dismissed on the ground that corporations are in principle exempt from jurisdiction under the ATS.

Moreover, almost every ATS case since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),

including the cases specifically endorsed in *Sosa*, 542 U.S. at 725, and *Sosa* itself, involved extraterritorial human rights violations occurring on the territory of a foreign sovereign. There is nothing in the language, history, or jurisprudence of the ATS which supports Talisman's request for judicial amendment of the statute. Talisman's arguments on these issues are more properly addressed to Congress.

Talisman's Statement of the Case in its Conditional Cross-Petition raises numerous issues that were litigated below and challenged by Plaintiffs below but were not decided by the Court of Appeals. Talisman does not and cannot challenge the fact that the Court of Appeals' holding, that Plaintiffs had to produce evidence of Talisman's "purpose," was *the* dispositive ruling. (Cert. Pet. App. A30-32). If this erroneous ruling is reversed by this Court, as requested in Plaintiffs' Petition, the Court of Appeals would be required to consider all of Plaintiffs' other challenges, including the sufficiency of the evidence under the proper legal standard.

For example, at no point have Plaintiffs waived their genocide claims, as Talisman argues in its Cross-Petition. Plaintiffs introduced evidence that Talisman was aware of the ongoing genocidal acts committed in the oil fields on behalf of its joint venture with the Government of Sudan ("GOS") and advanced the conspiracy to commit genocide claim throughout this action. (Appellants' Opening Brief "AOB" 57-61, 78). The Court of Appeals specifically addressed Plaintiffs' genocide claims (Cert. Pet. App. A32-33) but found that federal common law did not

apply and Plaintiffs had not satisfied the "essential" elements for conspiracy in international law. Plaintiffs have challenged this decision in their Petition.

Moreover, many of the specific points made by Talisman about the sufficiency of the evidence are inextricably linked to the Court of Appeals' erroneous legal analysis, holding that Plaintiffs had to prove "purpose" to succeed on their aiding and abetting and conspiracy claims. For example, Talisman asserts that the district court found no admissible evidence that Talisman Energy "specifically directed" payments of royalties to be used for military procurement by the GOS. (Cross-Pet. 5). However, the district court erred precisely because it viewed the evidence of substantial assistance through the lens of its "purpose" standard. "The connection between the payment of royalties and the Government attacks on civilians is simply too indirect to permit the payment of royalties itself to serve as circumstantial evidence of an *intent* to assist in the Government's commission of war crimes and crimes against humanity." (Pet. Cert. App. 88) (emphasis added). The Court of Appeals also weighed the evidence only to determine whether it supported a showing of "purpose." "[T]here is no evidence that GNPOC or Talisman acted with the *purpose* that the royalty payments be used for human rights abuses." (Pet. Cert. App. 38) (emphasis added). There is, however, ample evidence that Talisman made royalty payments *knowing* that the government would use oil revenues to finance the acquisition of advanced military hardware, such as the helicopter

gunships that conducted operations in the oil fields in violation of international law. (AOB 25-28).

Talisman states that both lower courts found that Plaintiffs failed to introduce adequate admissible evidence of Talisman's "purpose." Plaintiffs did introduce abundant evidence of Talisman's direct involvement in human rights violations and its intent to support and further the joint venture despite knowledge of the ongoing violations. The issue, thus, is not one of lack of evidence, as Talisman now asserts, but the erroneous legal standard employed by the Court of Appeals and its impact on the Court of Appeals' evaluation of the evidence presented.

Significantly, Talisman's strategic recharacterizations of the decisions below do not challenge Plaintiffs' primary point in their Petition namely that all of the issues not decided by the Second Circuit would have to be revisited if this Court agrees that the wrong standard was employed.

REASONS FOR DENYING CONDITIONAL CROSS-PETITION

This Court should deny Talisman's Conditional Cross-Petition on the issues of corporate liability and extraterritoriality. There is no conflict in authority on these issues and there is no case supporting Talisman's position on either issue. Corporations have been subject to suit under the ATS in dozens of cases and virtually every ATS case has involved extraterritorial acts. Congress has not decided to

limit ATS jurisdiction to claims against natural persons or solely to acts committed within United States territory. Nothing in the language, history or purpose of the ATS, or in this Court's *Sosa* decision, provides any exemption for corporations or limits the scope of the ATS to acts committed on the territory of the United States.

I. REVIEW OF THE ISSUE OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE IS INAPPROPRIATE IN THE ABSENCE OF ANY SPLIT IN THE CIRCUITS OR ANY OTHER CONFLICT OF AUTHORITY.

A. Corporate Liability is Not an Issue of Subject Matter Jurisdiction.

This Court need not resolve the issues raised in the Conditional Cross-Petition before reaching the issues raised in Plaintiffs' Petition. Plaintiffs have met all prerequisites for subject matter jurisdiction under the ATS. This case is brought (1) by aliens, (2) for torts, (3) committed in violation of the law of nations. There is no dispute that the violations alleged by Plaintiffs — genocide, war crimes and crimes against humanity — are actionable under *Sosa*.

Moreover, no court has ever found that the ATS precludes claims against corporations. *See* § (I)(D), *infra*. Thus, there is no question that the Court of Appeals had the jurisdiction to decide this case on the grounds it did. *See Steel Co. v. Citizens*

for a Better Env't, 523 U.S. 83 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case.").[1] Talisman did make the argument about the absence of corporate liability below;[2] however, this Court is not required to address this argument before it addresses the issues raised in Plaintiffs' Petition.

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[1] *See also, Bell v. Hood*, 327 U.S. 678, 682 (1946) (finding the district court has jurisdiction when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another" . . . except when the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."). *See generally* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure § 1350*, at 196 n.8 (2d ed. 1990) (citing cases).

[2] The district court's reasoning in denying Talisman's argument is persuasive. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp 2d 289, 308–09 (S.D.N.Y. 2003). *See also, Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp 2d 331, 335 (S.D.N.Y. 2005) (reaffirming decision).

B. This Court Did Not Hold That All Issues in ATS Cases Were Governed by International Law in Footnote 20 in *Sosa*.

Talisman's corporate exemption argument rests on a fundamental misinterpretation of this Court's footnote 20 in *Sosa*. *Sosa* did not involve any issues relating to corporations or to the choice of law governing the appropriate defendants in ATS cases. In fact, footnote 20 explicitly contemplated corporate liability under the ATS.[3] Note 20 addressed the issue of which international norms apply directly to non-state actors, including corporations,[4] as distinct from

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[3] Footnote 20 reads in full: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239–241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)." 542 U.S. at 733. The district court rejected Talisman's reading of footnote 20 in the course of its rejection of its corporate liability argument below. *Talisman*, 374 F. Supp. 2d at 335-36.

[4] *See, e.g.*, Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72 (2008). ("By grouping 'corporations and individuals' together as private actors, the statement can be read as

those norms which require a showing of state action. This Court did not hold in note 20, or elsewhere in *Sosa*, that international law governs all issues regarding the scope of liability in ATS cases. For the reasons set forth in Plaintiffs' Petition, federal common law should apply to all issues other than the "law of nations" violations that provide the courts with the authority to enforce federal common law tort remedies. At a minimum, though, *Sosa* does not hold that international law determines whether corporations are subject to ATS liability and Talisman's attempt to use *Sosa* as the justification for review in this Court should fail.

C. There is Nothing in the History, Language, or Purpose of the ATS That Provides An Exemption From ATS Liability For Corporations.

The plain language and history of the ATS rebut Talisman's request for a special exemption from ATS liability for corporate defendants. A blanket exclusion for corporate actors would also conflict with the fundamental remedial purpose of the statute.

The original wording of the ATS granted the district courts "cognizance . . . of *all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to

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affirming the potential liability of corporations alongside private individuals under the ATS.").

Establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added). This formulation refutes any implication that non-natural private actors, such as corporations, were excluded from ATS liability by the first Congress.[5] It is evident from the text that Congress was focused not on the identity of the defendant but rather on the right that had been violated (a right under "the law of nations or a treaty of the United States") and the identity of the plaintiff ("an alien"). *Id.* Congress has never acted to restrict the universe of ATS defendants since the law's enactment in 1789.

The inability of the national government to remedy violations of the law of nations was a major concern of American leaders in the years leading up to passage of the ATS. *See Sosa*, 542 U.S. at 715-18. James Madison complained that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." The Federalist No. 42, at 264-65 (James Madison) (Clinton Rossiter ed., 1961).

In 1781, the Continental Congress passed a resolution recommending to the States that they "provide expeditious, exemplary and adequate

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[5] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("The Alien Tort Statute by its terms does not distinguish among classes of defendants. . .").

punishment" for violations of the law of nations and treaties to which the United States was a party. 21 Journals of the Continental Congress 1774-1789, at 1136-37 (G. Hunt ed., 1912).[6] As this Court recognized in *Sosa*, Congress intended the ATS to provide tort remedies in addition to criminal penalties provided for elsewhere. 542 U.S. at 716.

The purpose of the ATS was to provide redress in the federal courts for aliens who had suffered a violation of their rights under international law. Because "torts in violation of the law of nations would have been recognized within the common law of the time," *Sosa*, 542 U.S. at 714, these actions could have been brought in state courts of general jurisdiction. *See id.* at 721–22 (rejecting the argument that the 1781 resolution showed that such torts were not actionable in state courts). Indeed, the ATS specified that the district courts' jurisdiction over these torts would be "concurrent with the courts of the several States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. For the First Congress, however, the availability of a federal remedy was crucial. *See generally* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am.

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[6] These provisions from Congress's 1781 resolution are acknowledged to be the direct precursors of the ATS. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-91 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 226-28 (1996).

J. Int'l L., 461, 481–88 (1989). In addition to shielding aliens from hostility in state courts,[7] the availability of a federal forum for international claims promoted uniformity of interpretation of the law of nations.[8] Exclusion of corporations from the scope of ATS liability, even where corporations aid or abet human rights violations actionable under the ATS, is at odds with all of these purposes.

The history of the ATS shows that, as early as the 18th century, the liability of non-natural persons under the act had been contemplated. It was clear to Attorney General William Bradford in 1795 that foreign companies could bring suits under the ATS. In an opinion arising from an attack off the coast of Sierra Leone (a breach of neutrality), Bradford found that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States. . . ." 1 *Op. Att'y Gen.* 57, 59 (1795). Bradford saw no issue in the ability of a company bringing an ATS claim. There is no basis in text,

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[7] *See generally* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1440-53.

[8] *See* The Federalist No. 3, 41, 43 (John Jay) (Clinton Rossiter ed., 1961) ("Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas, adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent . . . .").

history, principle, or precedent to believe that a company involved in the same attack would not similarly have been an appropriate ATS defendant.[9]

Attorney General Bradford's conclusion is not surprising given the fact that corporations and other non-natural persons were understood to be susceptible to tort liability at the time the ATS was enacted. Corporations would have been assumed to be proper defendants in an ATS case under the tort principles of the era.

Moreover, tort liability for maritime claims, which were and are part of the law of nations, predates the founding of our Nation. *See* Federalist No. 80, n. 61 (Hamilton). The history of federal court jurisdiction over maritime torts, including violations of the law of nations, was compiled by Justice Story in *De Lovio v. Boit*, 7 F. Cas. 418 (1815), and more recently by this Court in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2611 (2008), which held that maritime tort remedies against a corporation include punitive damages. This history demonstrates that maritime law was part of the law of nations adopted as federal law at the time of the Republic's founding

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[9] In 1907, Attorney General Charles Bonaparte found that an American corporation could be sued under the ATS for a tort in violation of a treaty of the United States. *See* 26 *Op. Att'y Gen.* 250, 252 – 53 (1907). Nothing in the treaty provided for private rights or liabilities but the Attorney General found that the ATS applied to a corporate defendant.

and that personal and corporate or company liability was routine. There is no basis to find that the Founders would have intended or expected an implicit exemption from liability under the ATS for corporations because they understood that transnational tort liability, for maritime and other torts, was routinely directed at private actors, including corporations.

The *Bolchos* case is further evidence the drafters of the ATS would have drawn no distinction between individual and corporate defendants for the purposes of that liability under the ATS. In *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795), the defendant, an individual acting as agent for a British mortgagee, had seized and sold slaves which properly belonged to a French privateer, under the terms of a treaty with France. *Id.* The court found jurisdiction under the ATS based on the violation of that treaty. *Id.* at 810. Although Darrel, the agent in *Bolchos*, was an individual, there is nothing in *Bolchos* to suggest that had the mortgagee been a corporate entity there would be no liability under the ATS. The court engaged in no analysis suggesting that ATS jurisdiction was limited to natural persons.

Again in the 19th century, legal actions for violations of the law of nations applied to non-natural persons. In 1819, Congress provided for the forfeiture of ships engaged in "piratical aggression." Act of March 3, 1819, ch. 77, § 2, 3 Stat. 510, 512–13, continued by Act of May 15, 1820, ch. 113, § 1, 3 Stat. 600, 600. As Justice Story noted in *The Marianna Flora*, "piratical aggression by an armed vessel

sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. 1, 40-41 (1825). Such forfeiture proceedings were brought *in rem* against the ship itself. In *The Palmyra*, Justice Story rejected the argument that criminal proceedings against the captain or crew were a necessary precondition to the proceedings against the ship. 25 U.S. 1, 14 (1827).[10]

In sum, the weight of the textual and historical evidence suggests that the First Congress would have considered non-natural private actors, including corporations to be proper defendants under the ATS. There is nothing in the text, history or purpose of the ATS that supports the argument that an ATS plaintiff must show an affirmative right to bring a

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[10] Not only could legal actions for violations of the law of nations be brought against things like ships, they could be brought irrespective of the innocence of those things' owners. "It is not an uncommon course in the admiralty, acting under the law of nations," Justice Story explained, "to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *The Malek Adhel*, 43 U.S. 210, 233 (1844). *See also The Little Charles*, 26 F. Cas. 979 (1818) (No. 15,612) (Marshall, C.J.) ("But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner.").

tort claim against a corporation under international law.

D. No Court Has Ever Held That the ATS Does Not Apply to Corporations in the Same Manner as Any Other Tort Defendant.

The language of the ATS makes no distinction between natural and non-natural defendants, and courts have drawn no distinction between corporations and any other defendants in ATS cases. Thus, it is not surprising, in light of the language, history and purpose of the ATS, all ATS cases pre-*Sosa*[11] and post-*Sosa*[12] have allowed claims against

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[11] *See, e.g., Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078

corporate defendants to proceed under the ATS. Courts have drawn no distinction between corporations and any other defendant. Indeed, for more than fifteen years,[13] ATS litigation against corporate defendants has been ongoing without a single decision rejecting the applicability of the ATS to corporations or any Congressional action to alter

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(S.D. Fla. 1997).

[12] *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D.Va. 2009); *Estate of Abtan v. Blackwater Lodge & Training Ctr.*, 611 F. Supp. 2d 1 (D.D.C. 2009); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008); *Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007); *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005); *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004).

[13] The courts have allowed ATS claims against other non-natural defendants to proceed for even longer. *See, e.g., Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (defendants included the PLO); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

the ATS or circumscribe such litigation. Talisman's argument is merely the latest attempt to obtain a judicial repeal of the ATS, in this case a selective repeal for corporations. However, Congress has taken no steps to restrict the ATS in response to *Filartiga* and its progeny, including dozens of cases alleging corporate complicity in human rights violations.

Requiring international law to supply the answers to questions like this one would render the ATS a dead letter. This Court explicitly rejected this outcome in *Sosa*, 542 U.S. at 724, 731, and cited Judge Edwards opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J. concurring), for the proposition that international law does *not* specify the domestic means for its enforcement. It was, and is, up to Congress to decide to exclude corporations from tort liability for complicity in egregious human rights violations such as the violations alleged by Plaintiffs in this case.

E. The ATS is Not in Conflict With International Law.

International law allows states to enforce their international obligations, or indeed to take action beyond their obligations, so long as such actions are not prohibited by international law. *See The Case of the S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 at 18-19 (Sept. 7). With the ATS, the first Congress decided to implement its obligation to provide a forum for adjudication of law

of nations violations by means of tort liability. Nothing in international law, then or since, prohibits that choice by Congress.

Corporate tort liability is in keeping with general principles of law which provide for corporate civil liability wrongs like these in all legal systems. *See* Brief of *Amicus Curiae* International Law Professors in Support of Plaintiffs-Appellees, *Balintulo v. Daimler AG*, 09-2778-CV, at 14-19 (December 22, 2009) (appeal pending) ("*Balintulo Amicus* Brief") (surveying corporate liability regimes in the United Kingdom, India, Australia, Canada, South Africa, the United States, Belgium, France, Israel, the Netherlands, Norway, Colombia, China, Thailand, Japan, Switzerland, Brazil, Indonesia, Italy, Germany, Spain, and Russia and finding "no jurisdiction that lacks the legal means of holding juridical persons accountable for their actions."). Thus, there is nothing unusual about imposing civil tort liability on corporations. It is a feature of all legal systems.[14]

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[14] *See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 390 (1953) (noting that general principles encompass "the fundamental principles of every legal system" and that they "belong to no particular system of law but are common to them all."). *Amici* International Law Professors accordingly found that "[b]ecause corporate liability for serious harms is a universal feature of the world's legal systems, it qualifies as a general principle of law." *Balintulo Amicus* Brief, at 14.

Talisman's citation to international fora where corporations have been excluded from particular international criminal regimes is irrelevant to the issue of corporate tort liability under the ATS. The Rome Statute creating the International Criminal Court and the Statutes of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda do not extend criminal liability to non-natural persons.[15] This was a choice made by the parties creating those criminal remedial fora and is not based on any international law prohibition on corporate criminal or civil liability. Indeed, these international agreements do not preclude corporate criminal liability for the same crimes in domestic legal systems which provide for such liability.[16]

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[15] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 6 May 25, 1993, 32 I.L.M. 1192. Statute of the International Tribunal for Rwanda, art. 5, Nov. 8, 1994, 33 I.L.M. 1598, 1600. Rome Statute of the International Criminal Court, art. 25(1), opened for ratification July 17, 1998, 2187 U.N.T.S. 90.

[16] The International Scholars *Amicus* Brief in *Balintulo* includes a survey of state practice in which a substantial number of states provide for corporate criminal liability and all provide for some form of corporate tort liability. Now that the Second Circuit has indicated an interest in the issue of corporate ATS liability, Cert. Pet. App. A 36 n. 12, it is likely that a great deal of scholarly work will be done to respond to that interest. If a circuit split emerges, this Court would

Unlike foreign sovereign immunity or diplomatic immunity, there is absolutely *no* basis in international law for Talisman's claim that corporations are shielded from civil tort liability by any treaty or principle of customary law. To the extent international law supplies a defense to corporate liability in these circumstances, Talisman would be able to raise such a defense on remand. Talisman has made no showing that such a defense exists.

II. THE ISSUE OF THE EXTRATERRITORIAL APPLICATION OF THE ATS DOES NOT WARRANT REVIEW IN THIS COURT.

A. Extraterritoriality Is Not an Issue of Subject Matter Jurisdiction.

As set forth in § (I)(A), *supra*, all the explicit statutory prerequisites for subject matter jurisdiction under the ATS have been met in this case. No case has ever questioned the extraterritorial application of the ATS. Indeed, *Sosa* involved the application of the ATS to extraterritorial violations. This Court is not required to reach this issue to determine the issues in Plaintiffs' Petition.

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have the benefit of that scholarly work after more lower courts have actually addressed this issue on the merits.

B. The Language and History of the ATS Clearly Establish That it Was Meant to Apply Extraterritorially.

On its face, the ATS has no territorial limit. The First Continental Congress knew how to limit the application of laws within the Judiciary Act to the borders of the United States.[17] *See Judiciary Act*, ch. 20, §9, 1 Stat. 73, 76-77 (1789) ("The district courts shall have . . . cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas.*") (emphasis added). While Congress chose to limit the reach of the Act in relation to *crimes* in some respects, it did not choose limiting language for civil claims under the ATS. *Id.* at 77. There is no evidence, whatsoever, of any Congressional intent to limit the ATS to violations occurring within the U.S. territory.

The history of the ATS establishes that the statute was meant to apply extraterritorially. Piracy was invariably extraterritorial. *See U.S. v. Smith*, 18 U.S. 153 (1820).[18] This Court has long held that the

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[17] *See* Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents at 23, *Sosa*, 452 U.S. 692 (2004) (No. 03-339).

[18] *See, e.g.*, United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 (piracy consists of acts occurring on the "high seas" or

presumption against extraterritoriality applies to offenses occurring on the high seas.[19] In *Sosa*, this Court affirmed that the First Continental Congress intended for the ATS to apply to piracy. 542 U.S. at 719. This alone negates any argument that Congress intended the ATS to be limited to United States territory.

The 1795 Bradford opinion confirms that the ATS was meant to apply to extraterritorial violations of the law of nations. The opinion was issued in relation to American citizens who had aided and abetted a French fleet in attacking a British settlement in Sierra Leone, an action occurring entirely outside of the United States and within the territory of a foreign sovereign. 1 *U.S. Op. Atty. Gen.* 57 (1795); *Sosa*, 542 U.S. at 721. There is no indication whatsoever in the Bradford opinion that the ATS did not apply to law of nations violations committed within the sovereign territory of another country.

"outside the jurisdiction of any State").

[19] *See Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) ("The rights of war may be exercised on the high seas, because war is carried upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign"); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute").

Furthermore, the drafters of the ATS understood that torts were transitory permitting plaintiffs to bring tort claims wherever the tortfeasor could be found. *See McKenna v. Fisk*, 42 U.S. 241, 248 (1843) ("[T]here is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.") (quoting Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774)).[20]

The First Congress, through the ATS, provided a federal forum for transitory torts involving a violation of the law of nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting that the ATS was passed to ensure that "matters of international significance" were adjudicated by federal courts). In sum, the language and history of the ATS demonstrates Congress' intent for the statute to apply extraterritorially. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (declaring that the presumption against extraterritoriality is inapplicable where contrary intent is clear).

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[20] *See also*, Restatement (Second) of Foreign Relations Law of the United States § 19 (1965); *Stoddard v. Bird*, 1 Kirby 65 (Conn. 1786) (Ellsworth, J.) (holding that the action of false imprisonment was transitory, permitting the action to be brought wherever the defendant was found); *Filartiga*, 630 F.2d at 855 ("It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.") (citing to *McKenna*); *Dennick v. R.R. Co.*, 103 U.S. 11 (1880) (wrongful death action held transitory).

C. *Sosa* Confirms That the ATS Applies to Extraterritorial Human Rights Violations.

Talisman's argument is inconsistent with *Sosa*. First, all of the events at issue in *Sosa* were extraterritorial. Second, this Court affirmed a long list of cases based upon actions taking place within the territory of foreign sovereigns.

First, in *Sosa* itself all of the challenged actions took place within Mexican territory. 542 U.S. at 698 (noting the abduction and arbitrary detention in question occurred entirely in Mexico). Defendant Sosa was one of six Mexican nationals who kidnapped Dr. Alvarez-Machain and held him for less than twenty-four hours in Mexico before delivering him to DEA officials in El Paso, Texas. *Id.* By the time the case got to this Court, all claims based on events taking place in U.S. territory had been dismissed.[21] Thus, if the ATS did not apply to actions taking place outside U.S. territory or within a foreign sovereign's territory, this Court would have lacked subject matter jurisdiction. 542 U.S. at 731-34. This Court ruled on the merits of Dr. Alvarez-Machain's claims despite the fact that the United

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[21] *See Alvarez-Machain v. United States*, 331 F.3d 604, 636-37 (9th Cir. 2003) (noting that the tortious activity in question occurred almost solely within the confines of Mexico) (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70); *see also Sosa*, 542 U.S. at 753 (Ginsburg, J., concurring) ("[n]o tortious act occurred once Alvarez was within United States borders . . .").

States advanced the same extraterritoriality argument Talisman advances here.[22]

Sosa also explicitly affirmed a long line of precedent applying the ATS to cases brought to redress extraterritorial human rights violations. *See Sosa*, 542 U.S. at 730-33. Among the cases affirmed as consistent with the holding in *Sosa* was the seminal case in modern ATS litigation, *Filartiga v. Pena-Irala*, which found that jurisdiction existed even for torture that had been committed wholly in Paraguay, by a Paraguayan national and against a Paraguayan citizen. *See Id.* at 725, 732, *citing Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Sosa* also affirmed *In re Estate of Marcos*, where the district court held that jurisdiction was proper in a case involving claims by Philippine nationals that former Philippine President Marcos was responsible for torture, extra-judicial executions and disappearances committed exclusively on Philippine territory. *Id., citing Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994).

In finding that claims under the ATS must be violations of well-established international human rights norms, this Court noted that its reasoning was "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court." *Sosa*, 542 U.S. at 732. In fact,

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[22] *Br. for U.S.* 48-50, *Sosa*, 452 U.S. 692 (2004) (No. 03-339).

no pre-*Sosa*[23] or post-*Sosa*[24] court has ever held, or

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[23] *See, e.g.*, *Flores v. Peru Copper Co.*, 414 F.3d 233 (2d Cir. 2003) (claims arising in Peru); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (claims arising in Nigeria); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999) (claims arising in Indonesia); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996) (claims arising in Ethiopia); *Kadic v. Karadzic*, 70 F.3d 232, 238-45 (2d Cir. 1995) (claims arising in Bosnia); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y., 2000) (claims arising from the Holocaust and against a French corporation); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 446 (D.N.J. 1999) (claims arising in Germany); *Eastman Kodak Co. v. Kalvin*, 978 F. Supp 1078, 1094 (S.D. Fla. 1997) (claims arising in Bolivia); *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 992 (C.D. Cal. 1997) (claims arising in Burma).

[24] *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir 2009), cert. denied, 130 S.Ct. 110 (2009) (claims arising in El Salvador); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1257 (11th Cir. 2009) (claims arising in Colombia); *Abdullahi v. Pfizer*, 562 F.3d 163, 175-80 (2d Cir. 2009) (claims arising in Nigeria); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (claims arising in Somalia) *aff'd*, 2010 WL 2160785, No. 08-1555; ; *Sarei v. Rio Tinto*, 550 F.3d 822, 824 (9th Cir. 2008) (claims arising in Papua New Guinea); *Romero v. Drummond Co.*, 552 F.3d 1303, 1308-09 (11th Cir. 2008) (claims arising in Colombia); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260-62 (2d Cir. 2007) (claims arising in South Africa); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245 (11th Cir. 2005) (claims arising in Guatemala); *Lev v. Arab Bank, PLC*, No. 08-CV-3251 (NG)(VVP), 2010 WL 623636, *3 (E.D.N.Y. 2010)

even questioned, whether the ATS applied to human rights violations committed outside U.S. territory. While there are a series of doctrines of deference which may limit ATS claims in particular cases,[25]

(defendant's argument that the ATS does not apply extraterritorially was held to be "meritless"); *In re XE Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 573 (E.D. Va. 2009) (claims arising in Peru); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 378 (E.D.N.Y. 2008) (claims arising in Bangladesh); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1357 (S.D. Fla. 2008) (claims arising in Cuba and Curacao); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008) (claims arising in Nigeria); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 259-60 (E.D.N.Y. 2007) (claims arising in Israel); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 990 (S.D. Ind. 2007) (claims arising in Liberia); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 223 (D.D.C. 2007) (claims arising in Ecuador).

[25] Political question, international comity, *forum non conveniens* and the Foreign Sovereign Immunities Act ("FSIA") have been among the most commonly used doctrines to resolve conflicts of interest with foreign sovereigns in ATS cases. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (FSIA); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009) (*forum non conveniens*); *Corrie v. Caterpillar*, Inc., 503 F.3d 974 (9th Cir. 2007) (political question); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (ATS political question); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, (international comity and *forum non conveniens*). This Court referred to such doctrines of case specific deference in *Sosa*. 542 U.S. at 733, n.21.

extraterritoriality has never been one of them. The judicial imposition of a territorial limitation on ATS claims is an inappropriate substitute for these well-established doctrines.

Not only has Congress not chosen to limit the ATS or overturn *Sosa*, it has added the Torture Victim Protection Act to § 1350, which explicitly grants U.S. courts extraterritorial jurisdiction for extra-judicial execution and torture of U.S. citizens.[26] *See* 28 U.S.C. § 1350. Congress cited approvingly to *Filartiga* in its passage of the TVPA and noted that "Section 1350 has other important uses and should not be replaced."[27] H.R. Rep. No. 102-367, pt. 1, p. 3 (1991); *see also* S. Rep. 102-249, pt. 5 (1991). One of the main purposes of passing the TVPA was to

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[26] In *Sosa*, this Court indicated that Congress had "expressed no disagreement with our view of the proper exercise of the judicial power," rather Congress had "responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail" through its enactment of the Torture Victim Protection Act. *Sosa*, 542 U.S. at 731.

[27] Congress also cited approvingly to *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), which applied the reasoning in *Filartiga*, to claims arising out of the "Dirty War" in Argentina. *See* S. Rep. 102-249, Pt. 4 (1991). Congress noted that the TVPA was in part a specific response to Justice Bork's concurrence in *Tel-Oren*, which expressed doubt over a private right of action under the ATS. *See* H.R. Rep. No. 102-367, pt. 1, p. 3 (1991, *reprinted in* 1992 U.S.C.C.A.N. 84, 86); S. Rep. 102-249, pt. at 4 (1991).

expand to U.S. citizens the civil remedies for torture committed extraterritorially.[28] *Id.* It is clear that the *Sosa* Court, the lower courts and Congress have approved of extraterritorial application of the ATS. There are no cases, much less a split of authority, on this issue justifying review in this case.

D. International Law Does Not Limit the Extraterritorial Application of the ATS.

International law has always permitted states to exercise jurisdiction over acts committed outside their territorial jurisdiction as long as such jurisdiction is not prohibited by international law. *See S.S. "Lotus" (Fr. v. Turk.)*, at 18-19. Not only is there no international norm prohibiting the exercise of civil jurisdiction for acts committed extraterritorially, many states and courts have endorsed civil jurisdiction over such claims.[29]

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[28] "There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing." H.R. Rep. No. 102-367, pt. 4 (1991); *see also* S. Rep. 102-249, pt. 5 (1991).

[29] *See Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment ¶ 155 (Dec. 10, 1998) (indicating human rights victims could bring civil suits in foreign courts for damages); *see also*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 148-52 (2006) (noting that states such as Britain and Italy have found jurisdiction in cases of torture committed wholly in a

There is no doubt about the legitimacy of U.S. courts adjudicating tort claims against a foreign corporation which conducts ongoing business in New York. Restatement, at § 401(b) and § 421(1), (2)(h). Jurisdiction to adjudicate is reasonable when "the person, whether natural or judicial, regularly carries on business in the state."

United States courts violate no international norm by imposing tort liability on a foreign corporation doing substantial ongoing business in the United States for its complicity in genocide, war crimes and crimes against humanity.

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foreign nation and that the Convention Against Torture and The Hague Judgments Convention have supported similar claims); Restatement (Third) of Foreign Relations, § 404 cmt b (1987) ("In general, jurisdiction on the basis of universal interests has been exercise in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims or piracy.").

CONCLUSION

For all of these reasons the Conditional Cross-Petition should be denied.

Date: June 23, 2010

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